No. 4308.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Christina M. Hoeffner, as Administratrix of the Estate of John H. Hoeffner, Deceased,

Appellant,

vs.

National Steamship Company,

Appellee.

BRIEF FOR APPELLANT.

JOHN J. MONAHAN,
Proctor for Appellant.

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PRELIMINARY STATEMENT.

August 29, 1922, appellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, filed a libel *in personam,* in the District Court of the United States, in and for the Southern District of California, Southern Division, against the National Steamship Company, owner of the Steamship Brunswick, for $20,000.00 damages, for death by wrongful act of her late husband, the aforesaid John H. Hoeff-

ner, who, while employed on board said ship Brunswick as a longshoreman, was precipitated overboard therefrom and was drowned in Los Angeles harbor on April 18, 1922.

September 2, 1922, respondent filed its claim and answer.

November 6, 1922, the court, by stipulation of the parties, and in pursuance thereof, made an order of reference in the above entitled matter directing United States Commissioner Stephen G. Long to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree.

December 1 and 2, 1922, pursuant to above mentioned order of reference, testimony was taken by said U. S. Commissioner Stephen G. Long, all witnesses appearing before him personally, at the Federal building, Los Angeles, the libellant being represented by her proctor, John J. Monahan, and the respondent by Joe Crider, Jr., Esq. Case submitted on briefs.

December 2, 1922, at the close of the testimony, it was stipulated between respective proctors, and agreed to by the commissioner, that respondent file amendment to his answer, setting up an affirmative plea of contributory negligence, and that the testimony be considered with that plea before the commissioner. At the same time leave was granted libellant to file amendment to libel asking for exemplary damages, and on December 14, 1922, libellant filed amendment to libel and asked for $5,000.00 exemplary damages.

February 26, 1923, commissioner's report in above entitled matter was filed.

March 10, 1923, respondent filed exceptions to commissioner's report.

March 12, 1923, respondent filed petition for rehearing and re-reference.

April 2, 1923, respondent filed amendment to exceptions to commissioner's report.

Commissioner's report argued orally and submitted to court, Honorable Benjamin F. Bledsoe, on briefs.

November 30, 1923, court filed opinion sustaining exceptions to commissioner's report, and referring matter to the commissioner for a new hearing or for such other action as by the parties may be deemed appropriate.

Libellant having failed to take any further action, February 4, 1924, final decree, sutaining exceptions to commissioner's report, and dismissing libel, was filed.

July 30, 1924, notice of appeal, bond, and assignment of errors filed, and appeal perfected.

STATEMENT OF THE CASE.

Substance of the Libel.

I. The libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased (her late husband), filed a libel *in personam* against the National Steamship Company, owner of the Steamship Brunswick.

II. Libel alleged that John H. Hoeffner was employed by the master of the steamship Brunswick as a longshoreman to assist in unloading (lumber) cargo of that vessel, and that on April 15, 1922 (correct date April 18, 1922), while so employed in making up sling loads of lumber, said vessel got under way, and proceeded upstream, and while so engaged and while ship was proceeding upstream, as aforesaid, the sling yielded a little so that he tripped and fell overboard; that there were no life lines, or life rails on side of vessel where deceased was working, so that he could be protected; that said vessel negligently continued on her way after deceased was precipitated into the water, and that she proceeded about 500 feet up stream before stopping; that no lifeboat was lowered to pick up deceased, and that there were no life buoys thrown and no effort was made, either by the master or crew of said vessel, to save the deceased, and that as a result thereof the deceased came to his death by drowning.

III. That in disregard of their duty to furnish, keep and maintain, a safe, sufficient and suitable place for said John H. Hoeffner to work in and to perform said labor, and to provide competent, capable and skillful seamen for the manning of said vessel, and to provide and maintain suitable, sufficient and safe appliances for said seamen to perform their respective duties in the management of said vessel, and also with respects to the saving of men that are thrown overboard, said respondent had knowingly, carelessly and

negligently failed to provide life rails or lines on that part of the deck where the said John H. Hoeffner was employed at the time of said accident, and had knowingly, carelessly and negligently employed seamen who were not skillful in the manning and lowering of the life boat, or the throwing out of life lines or life buoys for the rescue of said John H. Hoeffner, and who were unskillful in the stopping of the vessel, or giving of signals for the stopping of vessels for the picking up and rescuing of said John H. Hoeffner.

IV. The libel also alleged that the libellant was, and is, the duly qualified and acting administratrix of the estate of John H. Hoeffner, deceased.

V. That said John H. Hoeffner, left surviving him as his only heir, Christina M. Hoeffner, his widow, who was dependent upon him for support, and that before his decease the said John H. Hoeffner was able to secure continuous employment at his vocation as a longshoreman, and received therefor the sum of $200.00 per month; that were it not by reason of said death, caused by acts of said respondents, said John H. Hoeffner would now be able to earn said sum of $200.00 per month, and that by reason of said death, caused by said acts of respondents, the libellant, the said Christina M. Hoeffner, has been injured in the amount of $20,000.00.

Answer.

Respondent in his answer admitted that at all times mentioned in the libel he was the exclusive owner of the steamship Brunswick, and specifically denied all other material allegations thereof.

Amendment to Libel.

Upon leave duly had by the court, the libellant filed amendment asking for the sum of $5,000.00 as exemplary damages.

Amendment to Answer.

No amendment to answer was in fact filed, but it was stipulated by and between the proctors that the case be submitted for the consideration of the commissioner and court, as if actually filed, whereby respondent set up affirmatively the plea of contributory negligence.

IMPORTANT EVIDENCE.

1. First Mate Ordered Deceased to Sling Up Lumber After Vessel Got Underway.

Q. What is your duty as a first mate regarding the loading and unloading of the vessel? A. Superintend the working, looking after the charge of loading, and unloading of the vessel.

Q. Was John H. Hoeffner employed on the vessel on the 18th day of April last? A. Yes, sir.

Q. After leaving the San Pedro Lumber Company's docks or at any time, about 8 o'clock in the morning,

did you give the deceased any orders? A. Yes, I gave him orders.

Q. What orders did you give him? A. I gave him orders to, I told him to start to sling up the lumber, get the sling ready.

Q. What time was this, about? A. Just about two or three minutes past eight.

Q. Were you under way at that time? A. Yes, sir. [Apostles, p. 111.]

Mr. Hoeffner came to me and said, "I'll work partners with you." I said, "Very well."

Q. Is this Mr. Hoeffner, the deceased in this case? A. Yes. At that, the mate told us to go on to work. I looked at the clock in the wheelhouse. It was exactly three minutes after 8. We went forward, which I would call, well, the forward end of the ship, to prepare the loads of lumber that was to be discharged at Blinn's, which consisted of redwood. I consider the planks about 2 by 12 and about 25 to 30 foot long. They were about 6—well, between 5 and 6 high, with a double plank, which meant about 12 inches high and about 24 inches wide. I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winch-driver and a man,—I forgot whether the mast stands fore or aft—yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck in under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared, that was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the

load and pulls it with his hand, and he gets it pretty near through. I said, "We will pull the sling back to get it in the center of our load." Well, in doing so, he couldn't get it back. So he stood on top of his load, exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, "Man overboard!" Gallagher. [Apostles, pp. 166 and 167.]

2 Deceased Had to Go on Top of Unprotected Lumber Pile About Nine Feet High While Vessel Was Under Way.

Q. Seaman Nagel. Anything else come under your observation? A. Well, the only thing I recollect, when these two men were putting on the sling, this man, of course, he couldn't go on the outside of this load of lumber he had piled on that sling, because this particular load of lumber was piled right on the edge of the deck-load, which is the extreme side of the ship, also the bulwarks, and he couldn't get the sling, he stood on top of the deck-load trying to pull this particular sling through there, and there was the top plank, it was a heavy plank, if I am not mistaken, a 3 by 12 redwood plank, approximately something like 18 or 20 feet long and very heavy plank, and one plank I noticed at the particular time when the man tried to put the sling on, it wasn't exactly right in place, that is, it was leaning at a slant, it was tipped; and when he stepped on there, I couldn't tell exactly how many inches the block was that they built the load on because I knew they had some job in getting the sling over,

I mean towards the middle of the load, and I know the second time I saw him,—I saw him the first time when the plank tipped, and I felt even myself it wasn't a safe proposition, but he slipped a second time, and the plank tipped again and he overbalanced himself and went overboard.

A. Well, the sling was on top of the deck-load, and the deck-load, according to my estimation, is about 9 feet, or in the neighborhood of 9 feet, above the deck itself. [Apostles, pp. 145 and 152.]

Q. First Mate Lind. Did you have any railing around the part of the ship where the deceased was working or did you have life lines there? A. No, there was nothing at all there. [Apostles p. 111.]

Q. As a matter of fact, there are no rails or life lines on the outward part of the vessel where the deck load is carried? A. When she is loaded or in the harbor there is not.

Q. No rail or life line there? A. Around the deck load in the harbor, no.

Q. That is the part where the deceased fell overboard? A. Yes.

Q. And there is no rail or life lines there? A. No.

3. The Brunswick Did Not Stop When the Cry of Man Overboard Was Raised.

A. The master of the ship * * * and of course, I had to stop her and go ahead to not back into the dock, and, in other words, I couldn't lay there and have this between * * * in case this boat coming up the channel, I had to let him go. I couldn't blockade the channel in any shape or form. Of course that was a boat underway a loaded vessel, a big vessel,

which couldn't stop, to get this man where he was overboard. [Apostles pp. 213-214.]

A. Gallagher. * * * And the board he was standing on turned, and he (deceased) slipped right off back, that is, facing the ship with his back towards the water. At that time the winchman, he hollered, "man overboard," I looked over the side. The ship was going * * * I ran aft to where the life buoy was on the starboard side. I would call it the starboard beam, that is, the stern, and it was fastened on to the rail. There was, well, a line, it is onto the life buoy, I think it is about half inch, to my judgment a half inch line. That line had the life buoy tied to the guard rail, called a slat knot on it; a flat knot on it, a square knot is what the sailors say, and that line was wet. I tried to get that line loose, and I worked on it. Again the time I did that, we were three ship lengths away from the man in the water. [Apostles, pp. 167-168.]

Q. Were you in a position, or, if in position, did you notice whether or not the Brunswick stopped after the man went overboard? A. No, sir; not until the man sank.

Q. Now, do you know whether or not the engines backed? (Discussion.)

The Commissioner: Do you know whether it backed or not? A. No, sir.

Q. You mean you don't know? A. I know that she didn't back.

Q. How could you tell from where you were standing (extreme stern) whether or not the engine of the Brunswick backed or not? A. You can tell by the vibration of the engines when a ship is going astern. When a ship is proceeding ahead and the engine is

turned over, the vibration of that engine will almost jar you off your feet. [Apostles, pp. 170-171.]

Q. Durante. Did you see the Brunswick at the time the man disappeared? A. Yes, sir.

Q. How far away from the deceased was the Brunswick at that time? A. I should judge between 6 and 700 feet, about three ship lengths off.

Q. At this time did you notice, did the Brunswick back her engines? A. Well, my idea is she didn't. Of course I couldn't swear to that.

Q. But she did have headway on her at the time you first noticed her? A. Yes, it was still going, moving ahead.

Q. After you got down to where the man was, did you have an opportunity to notice, or did you notice the Brunswick then? A. After the man went down, I did, yes.

Q. What was she doing then, going ahead or stopped? A. After I saw the man go down I looked up and the steamer schooner was, I should judge, she was about six or seven hundred feet away from the man and at the corner of the dock. [Apostles, pp. 182-183.]

Q. By the Commissioner. When you found out that there was a man overboard, how far were you from the Brunswick? A. I should judge about 700 feet, six or seven hundred.

Q. Was the man in the water between you and the Brunswick? In other words, were you further away from the man than the Brunswick was? A. I should judge we were about the same distance only I was east and the Brunswick was north.

Q. Kind of triangular, was it? A. Yes, sir. I was east and he was north from the man.

Q. By the Commissioner. And the man sank just about the time you reached the point where he was? A. Yes, just about. I should judge a minute or so afterwards. [Apostles, p. 186.]

Q. Thomas Johannesen. Where were you on April 18th last? A. I was working on the pipe. We busted a pipe line and we was repairing it. I was working unscrewing the rubber connections that connects the pipe together.

Q. Did the lumber schooner Brunswick come under your observation at that time? A. I didn't notice it before I heard someone hollering "man overboard."

Q. Where did this cry of "man overboard" come from? A. From the Brunswick.

Q. What was the Brunswick doing at this time? Was she going ahead or stopped or going astern? A. She was going ahead. [Apostles, pp. 187-188.]

Q. At the time the man disappeared for the last time did you notice where the Brunswick was? A. He was going ahead. [Apostles, p. 190.]

Note. It was stipulated at the close of Johannesen's testimony, that two other witnesses—Peterson and Asherman—would testify substantially same as Johannesen. [Apostles, p. 192.]

Q. William Hack. Were you employed there (Kerckhoff's Lumber Yard) on the 18th of April last? A. Yes, sir.

Q. Did you see a man falling overboard from the Brunswick * * * did the lumber schooner come under your observation on that date? A. She was going by and I thought she was coming in. I was going to catch the line. I was at the end of the dock and I saw a man in the water.

Q. Then what happened; did the Brunswick continue on her course? A. She kept on going.

Q. How long did she continue on her course going ahead after you saw the man in the water? A. I reckon she went to the other side of Kerckhoff's.

Q. I say, how far from the southern corner were you standing, the southern corner of the Kerckhoff dock? A. I was standing on the end.

Q. What is the length of the Kerckhoff dock? A. I figure about 8 or 900 feet long. [Apostles, pp. 193, 194 and 195.]

4. No Life Boat Was Lowered From the Brunswick.

Q. The Master of the Brunswick. Did you lower a life boat to rescue the man, or have one lowered? A. No, sir. We were making one ready to lower. [Apostles, p. 83.]

Q. Wm. O. Brown, chief engineer. By the Commissioner. But they didn't hoist her (life boat) up? A. No, sir. [Apostles, p. 200.]

5. No Life Buoy, Life Preserver, or Substantial Piece of Wood Was Thrown From the Brunswick.

Q. Gallagher. Did you see anybody throw a life buoy? A. No, sir.

Q. Were you in a position to see that, if a life buoy had been thrown, you would have observed it? A. Yes, sir.

Q. And did you see one in the water? A. Seen one threw off the pilot boat, the only one.

Q. I mean from the Brunswick? A. There was

none thrown from the Brunswick. The only one was thrown from the pilot boat. [Apostles, pp. 171-172.]

Q. William Hack. Were you in a position to closely observe the Brunswick at that time? A. I was about 200 feet, I guess.

Q. I mean there was no intervening object between you and the Brunswick? A. No.

Q. And you particularly noticed the Brunswick, thinking she was coming alongside your dock? A. She left San Pedro dock. I seen her coming and she went on by. That is how I noticed the man in the water. I was watching the boat.

Q. Did you see the Brunswick throw any life preserver? A. No, sir.

Q. Any piece of lumber? A. Nothing.

Q. Or chest cover or other floating substance in the water? A. Not a thing. [Apostles, p. 184.]

Q. Durante. Did you see any life preserver in the water other than the one thrown by the pilot? A. No, sir.

Q. Did you see any plank, piece of wood, that is substantial piece of wood, or anything else, that would assist in rescuing a man in the water? A. No, sir, In fact, I looked on account of Tom Johannesen, the man who brought the hat, told me there was no plank or nothing overboard and I looked around. [Apostles, p. 184.]

Mr. Crider. I move this testimony in regard to what Johannesen said be stricken out.

The Commissioner. It will be stricken out. (Part of *res gestae.*)

Q. In looking around, did you see any lumber, life preserver or chest cover? A. Not only the one the pilot threw out. The only one I saw was the pilot boat. [Apostles, p. 184.]

6. There Were No Efficient Efforts Made by Master, Officers and Crew of the Brunswick to Rescue John H. Hoeffner.

Q. The Master of the Brunswick. Then what did you do? A. What did I do?

Q. Yes. A. The first thing I done, I starboard the helm a little bit so the vessel would swing over so I could back the vessel, because if I hadn't done so I would run her into a pipe line so I would have damaged the pipe line, and also a big steamer proceeding out (in) at the time, I would have blocked the channel and it would be a case of collision. So the minute I seen I could back the vessel enough to stop headway on her I done so. [Apostles, p. 81.]

Q. What speed were you making at this time? A. Not very much speed. Just going slow.

Q. And how close to the deceased did you get with your ship in attempting to rescue him? A. Before I had a chance to turn the Brunswick around or do anything of the kind to rescue the man there was a boat and two launches at the man already, and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man the man was already drowned. [Apostles, p. 82.]

A. In order to avoid having a collision at the same time I am trying to save this man I am not going to put my vessel in front of the steamer coming towards me and have him run into my vessel. [Apostles, p. 98.]

Mr. Crider: What were you going to say? In a case of that kind what? A. The Master. I say in a case of that kind, a man being overboard—the way my vessel is fixed and the vessel coming up behind me in a case of that kind, I don't know what the rules call that

—I can't block the channel for that man coming behind me. If I did he would run into me. [Apostles, p. 99.]

Q. What was the distance between the Kerckhoff Lumber Company dock, that is, the San Pedro side, and this pipe line that you referred to, approximately—just about what distance? A. Approximately about 1,500 feet, somewhere in that neighborhood.

Q. 1,500 feet? A. Probably.

Q. And the length of your vessel is 162 feet? A. Yes. [Apostles, pp. 94, 95.]

Q. Captain, with reference to this steamer you testified as coming up on your starboard quarter, how far away from you was that steamer, just approximately? A. Well, I couldn't exactly, about 2,000 feet probably —somewhere in that neighborhood. [Apostles, p. 94.]

Q. Did you not testify this forenoon that there was a large steamer coming up astern? A. Exactly.

Q. And that was the reason you continued on instead of backing down to him—you didn't— A. I backed the vessel to get away from the channel so as to get the steamer to go by me. [Apostles, p. 216.]

Q. To give the steamer room to pass? A. Yes, and in doing so I had to back the vessel up. [Apostles, p. 217.]

Q. Gallagher. Answer the question; how long were you working at this knot? (which secured line of life buoy to rail.) A. On the ship.

Q. Yes. A. Between four and six minutes anyhow. [Apostles, p. 175.]

Q. By Mr. Crider: You saw them back there working on the life boat, did you? A. They stood there; they didn't attempt to do anything.

Q. You didn't see them do anything with the life boat? A. No, they didn't attempt. Just stood there looking around. [Apostles, p. 172.]

Q. First Mate Lind. Did you see anybody throw a life preserver over? A. No. I saw a life preserver on the deck when I came aft. [Apostles, p. 114.]

Q. By Mr. Crider. I believe you say you saw one of the life preservers on the deck, did you? A. On the deck when I stepped out, when I came aft.

Q. The life preserver was out of the sling, was it? A. Yes.

Q. It wasn't in this sling, or suspenders? A. No.

Q. Was it lying on the deck? A. Yes.

Q. What was its condition in regard to being wet or dry? A. It was wet. [Apostles, pp. 121 and 122 bottom and top, respectively.]

Q. Did you hear the cry of "man overboard?" A. Yes.

Q. What, if anything, was done by you at that time? A. When I heard the man holler I was turning my back to them and I heard a man on the forecastle holler "Man overboard." Then I went aft and I hollered to the captain. He was standing on the port side.

Q. The port side of the bridge? A. Yes. I walked around to see the captain and then walked aft. I saw the man by that time, the man was pretty well astern and there was two boats there launched and the boat alongside the pipe line over there, and there was somebody was hollering to him about 100 feet or probably more from the man at that time to go and get him. They didn't seem to understand it right away, see? And I says, "Come on, we will get the boat ready,

get them over." By that time them people launched two boats and they pull over to the man. When they was up to the man, pretty close to him, we consider well, he would be safe, anyway, for the simple reason we didn't swing the boat overboard because he was right alongside of him. [Apostles, p. 112.]

Q. When you heard the cry "Man overboard," did you not testify you walked from the lumber pile to the port side near where the captain was standing? [Apostles, p. 135 last question.] A. Yes, walked all around.

Q. Then where did you go after walking all around? A. I walked right aft to the boat.

Q. You saw the man in the water then? A. Yes, I saw him in the water.

Q. And you kept looking where the man was in the water? A. And I say, "we better get the boat over."

Q. Then you noticed the boats were coming? A. From the dredges.

Q. And you noticed the pilot boat was coming there? A. Yes.

Q. And you kept looking at them and seeing what they were doing? A. Yes.

Q. How long were you in that position of observation? A. I guess from the time I go fore to aft, about three or four minutes, something like that. [Apostles, p. 136.]

Q. Seaman Nagel. What happened after that, do you know? A. Well, at that particular time, as soon as I saw the man fall overboard, I shouted, "Man overboard." I, myself, grabbed for the rope sling and tried to throw it at him. When I looked over the side with the sling in my hand I saw two (the) man was astern

already, behind the ship. The ship had already passed him.

Q. Seaman Gibson. By Mr. Crider: Now, when you heard the cry of "Man overboard," and went to get this buoy to throw it over, did you saunter along leisurely or did you hurry? A. No, I never heard the cry "Man overboard" because I was down on the poop in the stern of the ship. We were getting the lines for when we go to Blinn's to make the ship fast. I heard these fellows running forward along the house and I heard them and I looked out to see what was going on and I seen them all excited and looking outside, and I looked and see a man floating by and I knew a man was overboard. [Apostles, p. 107.]

7. The Brunswick Was Unseaworthy on April 18, 1922, in Respect to (a) Life Boats and Other Life-Saving Appliances; (b) Incompetency of Master, Officers and Crew; (c) Inadequate Number of Seamen.

Q. First Mate Lind. What life boat did you decide upon launching? A. The port life boat.

Q. Did you have a life boat on the starboard side? A. Yes, sir. [Apostles, p. 113.]

Q. Chief Engineer. Which one of them (life boats) did they attempt to cast adrift? [Apostles, p. 205.] A. The port one.

Q. And the man fell overboard on the starboard side, did he? A. Yes, sir.

Q. And made no effort to cast the starboard boat adrift, did they? A. No, sir. The port one is the best to get over. [Apostles, p. 206.]

Q. First Mate Lind. You say you had a hawser coiled in the life boat? A. On the port side. [Apostles, p. 219.]

Q. And that was your working life boat? A. The working life boat.

Q. And it was in the skids at the time? A. Yes.

Q. And she was secure(d) there? A. She was secure.

Q. Secured for sea, that is, having lashings on? A. Yes.

Q. You also had the boat cover on? A. Yes.

Q. And the boat cover went over the fore and aft strong back? A. Yes.

Q. And it came down and was tied with stops around? A. Yes.

Q. Both stops under the keel? A. Yes.

Q. That was the position she was in at the time the man fell overboard? A. Exactly. [Apostles, p. 220.]

Q. First Mate Lind again. How many life buoys did the vessel carry? A. Four.

Q. Where are those four, where are those four located? A. Four located right aft on top, around the top deck aft on the rail there.

Q. Wouldn't that description you have just mentioned fit anywhere from the midship line over to the taffrail? A. No response.

Q. Can you describe any better the location of the life buoys than what you have already done? A. Right aft of the top deck, right aft the stern. [Apostles, pp. 114 and 115.]

A. Gallagher. * * * There was well, a line, it is onto the life buoy, I think it is about half inch,

to my judgment half inch line. The line had the buoy tied to the guard rail, called a slat knot on it; a flat knot on it, a square knot is what the sailers say, and that line was wet. I tried to get that line loose, and I worked on it. Again the time I did that, we were three ship lengths away from the man in the water. * * * [Apostles, p. 108.]

Q. What kind of line was attached to this buoy? A. I should judge it was the size of a fountain pen. A little bit bigger, maybe. [Apostles, p. 174.]

Q. How long were you working at this square knot you speak of, trying to get it adrift?

Q. Answer the question; how long were you working at this knot? A. On the ship?

Q. Yes? A. I should judge between four and six minutes, anyhow.

Q. And you found it secured, you found the life buoy secured to the rail with a piece of line the size of a fountain pen? A. Yes, sir.

Q. And you had considerable difficulty in untying that square knot? A. Yes, sir.

Q. Are you familiar with knots and splices? A. Yes, sir.

Q. Would you know how to untie a square knot quickly? A. Yes, sir. [Apostles, p. 175.]

Q. There wasn't any kind of a slip attachment for pulling the thing through? A. No, sir. There was a slip, that is, where the buoy sat in, but he was tied on the top of the rail, so you couldn't pull the buoy off. [Apostles, p. 176, top.]

Incompetency of Master, Officers and Crew of the Brunswick.

Q. The Master. I am not asking you about the inspectors. What method did you use for getting the life boats out in case of an emergency? A. Oh, we had the lashings to hoist the boat up and swing the davits out. [Apostles, p. 79.]

NOTE. Lashings are used only to secure objects. Boat falls are used for hoisting and lowering boats. Davit guys are used for swinging davits in or out.

Q. What kind of life boats do you carry on the vessel? A. Wooden life boats.

Q. Can you describe these boats any better than that? A. Not any better. [Apostles, p. 78.]

Q. And how close to the deceased did you get with your ship in attempting to rescue him? A. Before I had a chance to turn the Brunswick around or do anything of the kind to rescue the man there was a boat and two launches at the man already, and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man, the man was already drowned. [Apostles, p. 82.]

A. Johannesen. I was working on the pipe line. We busted a pipe line and we was repairing it. * * * [Apostles, p. 187.]

Q. How far away, about, was the Brunswick at that time from the man overboard? A. Oh, I guess about 300 feet.

Q. What was the Brunswick doing at this time? Was she going ahead, or stopped or going astern? A. She was going ahead.

Q. Now what happened when you heard the cry "Man overboard?" A. I throwed my tools away and jumped in the skiff, untied the skiff and started to pull over.

Q. With relation to the Brunswick how far away from the man overboard were you? A. I was about, I guess, about 800, between 7 and 800. [Apostles, p. 188.]

Q. What kind of a skiff is this that you are speaking of; is it a heavy working boat, or is it a little light frail boat? A. It is a heavy working skiff used on the pipe line.

Q. Now, was there anybody else in the skiff but yourself? A. All alone.

Q. So you pulled double sculls then? A. Yes.

Q. Did you get there just about the time the man disappeared for the last time? A. Just about the time he went down. [Apostles, p. 189.]

Q. The Master. Now when you shoved off from the San Pedro dock you were going about two or three miles an hour? A. I suppose. I say about that.

Q. Did you not testify this forenoon that there was a large steamer coming up astern? A. Exactly.

Q. And that was the reason you continued on instead of backing down to him—you didn't— A. I backed the vessel to get away from the channel so to get the steamer to go by me. [Apostles, p. 216.]

Q. To give the steamer room to pass? A. Yes, and in doing so I had to back the vessel up.

Q. I am not asking you that. I am asking you what duty, if any, you owe to an overtaking vessel? A. To let him pass if he decides to do so.

Q. That is your conception of the inland rules of the road, is it? A. Exactly. [Apostles, p. 217.]

Q. First Mate Lind. What do you call the main rigging? A. The main rigging is the main rigging. [Apostles, p. 116.]

Q. What kind of life boats did the Brunswick carry? A. Two wooden life boats.

Q. Can you describe those life boats? A. Well, they are about 20 feet long and about, I don't know, about 6—

Q. Beyond the dimensions can you give any further description of them so that if I went down I would know what class of boat to look for? A. The customary equipment, all equipment with air tanks.

Q. Did you have a compass on (in) the life boat? A. Yes.

Q. What make of compass? A. I don't know what make it is—Thompson.

Q. What kind of compass did you have for the ship, the Brunswick herself? A. I have forgotten. [Apostles, p. 118.]

Q. Seaman Gibson. What kind of line was attached to this life buoy? A. Just a common small manila rope as big as your finger.

Q. Describe it now. You are an A. B. (able body seaman.) Describe this what this line was? A. It is an ordinary manila rope, what we use of heaving line.

Q. Can you give any better description of that line than that? [Apostles, p. 107.] A. That's all you could describe it, about 15 feet long. [Apostles, p. 102.]

Q. How fast was she (Brunswick) going about? A. Well, I guess she was making a couple of miles an hour.

Q. When were you examined for A. B.? A. I never been examined for A. B.

Q. Do you mean two miles an hour or two knots an hour? A. Well, call it knots. I call it miles. [Apostles, p. 103.]

Q. Seaman Nagel. As winchman you are included as one of the deck hands? A. I belong to the deck crew.

Q. You are one of the four men of the deck crew? A. Yes. [Apostles, p. 143.]

Q. And you have lost the use of one eye, have you? A. I have. [Apostles, p. 146.]

Q. Now, did the Brunswick have any life buoys on it at that time? A. It did.

Q. How many? A. Four, as far as I can remember. I never counted them. [Apostles, p. 152.]

Brunswick Was Inadequately Manned on April 18, 1922.

Q. First Mate Lind. How many deckhands have you got on the Brunswick, or did you have last April on the Brunswick? A. Five men,—four men.

Q. Four men? A. Yes, sir, besides the longshoremen. [Apostles, p. 141.]

Q. Seaman Nagel. Is it true you have got four all together, four deckhands? [Apostles, p. 143, last question.] A. I couldn't say exactly how many men we had at that particular time, but as a rule we carry a roll of eight sailors and a winchman, sometimes even nine. [Apostles, p. 144.]

Contradictory and Conflicting Testimony.

Q. The Master. When did you leave San Pedro Company dock? A. Just as the 8 o'clock whistle blowed, or a few minutes after. [Apostles, p. 75.]

Q. First Mate Lind. And you use longshoremen for mooring and unmooring a ship, do you? A. Yes, sir. [Apostles, p. 141.]

Q. By Mr. Crider. Did you tell him (deceased) you were going to move it? A. It was hollered out "we're going to move; let go the lines."

Q. He was actually working on his sling when the boat was moving out in the water there? A. Yes. [Apostles, p. 140.]

Q. What orders did you give him (deceased)? A. I gave him orders to, I told him to start to sling up the lumber, get the sling ready.

Q. What time was this about? A. Just about two or three minutes past eight.

Q. Were you under way at that time? A. Yes, sir.

Q. Did you see this man in the pilot boat take the hat from the drowning man? A. No, not exactly from the drowning man, but from the position that he was in, right alongside the boat, where the man was, so to take the hat it must be probably laying on the water or on the man's head.

Q. You saw him take the hat off? A. Yes. [Apostles, p. 129.]

Q. Johannesen. Did you see the pilot take the hat of the deceased? A. No. I took it.

Q. You took it? A. Yes. [Apostles, p. 190.]

Q. Durante. Now did the pilot pick up the hat of the deceased? A. No, he didn't.

Q. Who did? A. A fellow by the name of Johannesen came over with a skiff and he picked the hat up after the man went down.

Q. You saw it? A. Yes and he passed it to the pilot man. [Apostles, p. 182.]

Q. William Hank. Did you see the pilot take the hat of the deceased from the water? A. No, sir.

Q. Did you see anybody take the hat? A. I know the fellow in the skiff picked up the hat.

Q. You saw him pick that hat up? A. Yes, sir. [Apostles, p. 196.]

Q. The Master. How big was the sling, captain, the sling of lumber? A. Well, I didn't size it up. I should judge it was about, probably, 20 inches high, that he was trying to put the sling around.

Q. Did you see him working with the sling on that batch of lumber? A. No, sir.

Q. Were there any life buoys thrown to Mr. Hoeffner when he was in the water? A. Yes, sir.

Q. There life buoys thrown? A. Yes, sir.

Q. Who threw that life buoy? A. The sailor sitting right over there.

Q. Did you see this man throw the life buoy? A. No, sir. [Apostles, p. 85.]

The above entitled matter, having, on the 6th day of November, 1922, been referred to United States Commissioner Stephen G. Long, by stipulation of the parties, and in pursuance thereof, under an order of the court directing him to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree, and said commissioner, having personally seen and heard all the wit-

nesses of the respective parties hereto, and having had the matter submitted to him for report in conformity with said order of reference, and the said commissioner, having on the 26 day of February, 1923, made his report in writing as follows:

Findings of Fact.

I.

That on the 18th day of April, 1922, and all of the time thereafter, the libellant was, and is, a housewife, having her place of residence at San Pedro, California; and that on the 18th day of April, 1922, the respondent National Steamship Company was the owner of a lumber vessel called the "Brunswick."

II.

That on April 18, 1922, John H. Hoeffner was employed by the master of the lumber vessel "Brunswick" to assist in unloading the deck load of cargo lumber on board that vessel, then at San Pedro Lumber Company's dock, which is on the west side of the Inner Harbor, San Pedro, California; that at eight o'clock in the morning of that date, the "Brunswick" cast off from that dock to go to the Blinn Lumber Company's dock on the east side of said Inner Harbor, but it was necessary for the said vessel to proceed in a northerly direction for a short distance so as to clear a dolphin to which the U. S. Government dredge was moored.

III.

That after the "Brunswick" cast off from the San Pedro Lumber Company's dock, as aforesaid, the first mate, who had charge of unloading the lumber cargo of that vessel, ordered the said John H. Hoeffner to sling up the lumber, and in obedience to said orders, it

was necessary for him to go on top of the lumber pile, stowed fore and aft, eight or nine feet high, and extended to the full width of that part of the ship and was flush with both sides thereof. The lashings of this lumber pile had previously been removed, and the top was a disordered mass of lumber; that said John H. Hoeffner, in company with his working partner, went on top of this lumber pile, the partner working inboard, and Hoeffner on the outboard side, it being necessary to start slinging from the extreme outboard part of the lumber, and immediately upon getting to his working position, and trying to pull the sling through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank that tipped too, and precipitated him overboard, and he was drowned.

IV.

That there were no life lines, life rails, or other protection outboard of this lumber pile, which, while a vessel was under way in a narrow harbor, and being subject to pitch or roll from the wash of propellers of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a place dangerous to life and limb for those who were required to work thereon.

V.

That the said John H. Hoeffner was precipitated overboard a few minutes after the vessel "Brunswick" got under way, as aforesaid, and that the speed of that vessel at that time was about two or three miles per hour; that the "Brunswick" did not immediately stop when the cry of "Man overboard" was raised; that no life boat was lowered, no life preserver, life buoy, or

piece of lumber was thrown from the "Brunswick" to said John H. Hoeffner, after he was precipitated overboard, and while struggling in the water, and that no efficient efforts were made to rescue him by the master, officers and crew of the said ship "Brunswick," and that the life boats and other life saving appliances of said ship "Brunswick" were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship "Brunswick" were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life saving appliances.

VI.

That said John H. Hoeffner was engaged in the work of longshoreman for about five months, and it does not appear from the evidence, how much of that time he was employed on board ships; that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, when he was immediately precipitated overboard; that he had no means of ascertaining the incompetency of the master, officers and crew of said ship "Brunswick" in their duties with the condition, accessibility and use of the life saving appliances of said ship "Brunswick," and that the danger resulting, or that might result from such conditions, as aforesaid, was a latent and not an obvious danger; that said John H. Hoeffner was not guilty of contributory negligence in the performance of his said work on board the said ship "Brunswick," and in no wise, while so employed, did he act otherwise than in a careful, cauetious and prudent manner under the circumstances.

VII.

That said John H. Hoeffner, on the 18th day of April, 1922, and while in the employ of respondent on board said ship "Brunswick," came to his death by drowning in the harbor of San Pedro, California; and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain, in a reasonably fit and accessible condition, proper and efficient life saving appliances on board said ship "Brunswick," and in the failure of the respondent to provide and maintain master, officers and crew competent and efficient in the handling of said ship "Brunswick" and in the stowage, accessibility and use of life saving appliances thereof.

VIII.

That said John H. Hoeffner left surviving him as his only heir Christina M. Hoeffner, his widow; and that said Christina M. Hoeffner was dependent upon him for support and maintenance.

IX.

That on the 25th day of July, 1922, by the order of the Superior Court of the county of Los Angeles, in the state of California, duly given and made, the libellant was appointed administratrix of the estate of John H. Hoeffner, deceased, and letters of administration on said estate were ordered to issue to libellant upon qualifying, and that the libellant thereafter qualified as such administratrix, and letters of administration were issued to libellant on the 25th day of July, 1922, and libellant ever since has been and now is the duly qualified administratrix of the estate of John H. Hoeffner, deceased.

X.

That before his decease, the said John H. Hoeffner was a man of fine physique, and in excellent health, was continuously employed, and was earning and giving to his said wife, Christina M. Hoeffner, an average weekly wage of fifty-five ($55.00) dollars; that said John H. Hoeffner was, at the time of his death, of the age of 37 years, and that his life's expectancy was 30.35 years; that the libellant has suffered injury by the death of said John H. Hoeffner in the sum of fourteen thousand four hundred ($14,400.00) dollars, as compensatory damages, and by reason of the reckless indifference to the rights and safety of said John H. Hoeffner by the respondent, as aforesaid, the further sum of one thousand ($1,000.00) dollars, as exemplary or punitive damages.

XI.

Conclusions of Law.

As conclusions of law, from the foregoing findings of fact, I find that the libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, is entitled to recover from the respondent, National Steamship Company, the sum of fifteen thousand four hundred ($15,400.00) dollars, and I recommend that judgment and decree be given to the libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, against the respondent, National Steamship Company, in the sum of fifteen thousand four hundred ($15,400.00). In arriving at the foregoing conclusion, I have carefully considered the authorities cited in the briefs filed by proctors for the respective parties herein, all of which is respectfully submitted.

STEPHEN G. LONG,
United States Commissioner.

(Seal)

Respondent filed exceptions in due time to the Commissioner's report, in substance as follows:

The evidence was insufficient to support findings of fact under Articles III, IV, V, VI and VII, and that there is not sufficient evidence to support the foregoing findings, it entitled to recover $15,400.00 from respondent, is unwarranted. Further, that the said foregoing facts, nor any of them are material to the issues raised in the pleadings on file herein. Again, that the Commissioner's findings of fact and conclusions of law did not take into account the fact that the accident was inevitable and unavoidable.

Respondent's remaining exceptions are, as follows:

1. Contributory negligence.
2. Court did not have jurisdiction of the action or the parties thereto.
3. No evidence to support the finding that exemplary or punitive damages should be assessed against respondent.

Respondent in his amendment to exceptions set out that the findings of fact made by the Commissioner do not support the conclusions of law, and especially that part finding that the libellant is entitled to recover from the respondent the sum of $15,400.00.

The court sustained the exceptions to the findings of fact and conclusions of law made by the Commissioner, and fully discussed the case in its opinion, which is included in the final decree dismissing the libel.

Findings of the Court.

1. The court found substantially as follows:

2. Court held that the finding that there were no life lines, life rails or other protection outboard of the deck-load of lumber (where deceased was required to work) and that in consequence, because of the liability to pitching and rolling, hitting or being hit by vessels or obstructions, the place was a dangerous one, is obviously irrelevant and untimely, because of the absence of any suggestion of any such happenings.

3. That the examination of the master, officers and crew by proctor for libellant as to certain matters of seamanship and the like, were wholly irrelevant to any inquiry pending before the Commissioner.

4. The court found that it is the fact that no life lines or life rails or other protection was placed around the deck-load of lumber, and that such protection was not required because "Deceased was sent to the top of the lumber pile in broad daylight," and that deceased assumed the risk. (The court did not use the words "assumed the risk," but the language used indicates that finding.)

5. That the deceased was precipitated into the water not because of any negligence of the respondent or any of its employees, but because of his own contributory negligence.

6. That there was no testimony as to the direction or speed with which water in the channel was moving, if at all, but that it must have been moving because the

deceased very rapidly either swam, that is, "paddled," or drifted beyond the stern of the ship.

7. The court further found that the captain stopped the ship with all celerity he could command, in view of all the circumstances, and that an approaching (overtaking) vessel had to be taken into consideration.

8. The court found that in speaking of the Brunswick after the deceased was precipitated overboard: "It is obvious it could not be stopped immediately, and an approaching (overtaking) vessel had to be taken into consideration."

9. That the Inland Rules of the Road respecting one vessel overtaking another, etc., could only be considered where the vessels were proceeding normally, and that obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like.

10. And that under such circumstances there was a duty devolving upon the master of the "Brunswick" to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or property into danger.

11. That it should be kept in mind that there were upon the water at the time two or three small craft, and were nearer to the deceased than those upon the Brunswick were, and should be taken into consideration

in determining the duty devolving upon the men of the Brunswick and the adequacy of their efforts.

12. The court further held: If it could be said that deceased could have been saved if proper and efficient life saving appliances not on board the Brunswick had been there, and had been used with reasonable promptitude and efficiency by the officers and crew thereof, then, of course there would have been strong reason for supporting the conclusions arrived at by the Commissioner, but that it should be borne in mind that it was stipulated that such equipment was there at time of inspections made both prior to and subsequent to the accident, and that there was no suggestion from any source of any change, and that the captain testifies that the usual and proper lifeboats and life buoys were on board and in their proper place.

13. That the partner of the deceased, a longshoreman, after deceased fell into the bay, started to throw a life preserver to him, obviously though working upon it, due perhaps to his excited state he did not know how to remove it from its appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to put it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up, and without difficulty took it from its place.

14. Very likely the partner of the deceased working on the life buoy deterred some of the sailors from going to it and throwing it overboard. Without doubt, it was thought that the partner of the deceased would do that what he was trying to do, to wit, throw a life preserver to the deceased.

15. That the deceased having fallen overboard, due to his own negligence, no recovery could be had unless it should be proven to the degree required by law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I cannot believe the proof adduced suffices to establish this conclusion, and disaffirm the conclusions and recommendations reached by the Commissioner, and that if the rule, contended for by the respondent, as illustrated in Burton v. Grieg, 271 Fed. 271, be accepted, then there is less ground for a decree in favor of libellant upon the facts actually adduced.

Final Issues.

Each of the above findings of the court has been assigned as error on this appeal, and become therefore the main issues in the case.

ARGUMENT.

Issue I.

The deceased was precipitated overboard immediately upon getting to his working position on top of lumber pile.

Gallagher, whom the testimony discloses was the working partner of the deceased, was ordered by first mate exactly three minutes past 8 to go to work, started out in search of sling, and having found it, proceeded to the top of lumber pile with deceased, and then tried to put this sling under prepared sling load of lumber, but the threads of splice stuck under the wood, and in pulling it back deceased stood on top of that load. [Apostles, p. 167, bottom.]

It is true that Seaman Nagel testified as follows:

A. Well, the only thing I recollect, when these two men were putting on the sling, this man, of course, he couldn't go on the outside of this load of lumber he had piled on that sling, because this particular load of lumber was piled right on the edge of the ship, also the bulwarks, and he couldn't get the sling, and he stood on top of the deck-load, etc. [Apostles, p. 145.] But this witness had but one eye, and he was some distance from the deceased. [Apostles, p. 146.] He was standing on forecastle head (the break or after end of forecastle), [Apostles, p. 144] and later he testified as follows: To the extreme end aft I wouldn't notice it because the forecastle head is lower than the deck-load. [Apostles, p. 149, top.]

Obviously, if two men would, or could, build a sling load of lumber of pieces 2″x12 by 25 or 30 feet long, they would place the sling in position first. The logical inference is that when such heavy planks are loaded they are placed in sling loads on chocks, and this facilitates unloading; chocks being uniform in size and the deck loads secured by chain lashings. Upon unloading it is only necessary to put sling under load, hook to block, and hoist out. This procedure is almost invariably referred to as building a sling load. It is the lumbermen's equivalent for preparing a sling load.

The fact that the deceased was precipitated overboard immediately upon getting to his working position, as testified by Gallagher, *supra,* is borne out by the testimony of the master as to time leaving the dock, i. e., just as the 8 o'clock whistle blowed, or a few minutes after [Apostles, p. 75]; by the testimony of First Mate Lind, "that he gave deceased orders to sling up lumber after the ship got under way, just about two or three minutes past eight; by the fact that the vessel left San Pedro Lumber Co. dock, and was seen by Hack, who was standing on southern corner of Kerckhoff's dock, adjoining and next dock north [Apostles, p. 195]; by the testimony of the master [Apostles, p. 216], Seaman Gibson [Apostles, p. 103]; Nagel [Apostles, p. 146], that the vessel was going about two or three miles an hour, and by the testimony of Chief Engineer Brown, that the vessel had full speed steam in boilers at time [Apostles, p. 204,

bottom], and that his log showed that the vessel went from one dock to another in 25 minutes, including the time spent in their alleged attempt to rescue deceased [Apostles, p. 209, top].

Issue II.

That the findings that in consequence of the absence of life lines, life rails or other protection on top of lumber pile, where deceased was required to work while vessel was under way, and the liability to pitch, or roll of the vessel, or other jar, the place was dangerous, were irrelevant and untimely, because of the absence of a suggestion of any such happening.

Art. 29, Sec. 7180, Barnes' Federal Code, page 1707, provides that:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, *or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.*"

In the Beechdene, 121 Fed. 594, held:

> "It is true that, if the officers of a ship direct a certain thing to be done in a certain way, they are held responsible if they negligently send the person employed by the ship into a place of danger, the danger of which could be obviated by reasonable care on the part of the officers of the ship."

In The Buffalo, 154 Fed. 815 (C. C. A., Second Cir.), it was held:

> "The rule of the maritime law that a vessel is not liable *in rem* for an injury to a seaman through the negligence of owner or master, does not apply to the case of a longshoreman who is employed by the owner of a vessel to work thereon, and is injured through being given an unsafe place to work."

Again, in Port of New York Stevedoring Corporation v. Castagna, 280 Fed. 619 (C. C. A., Second Circuit, Mar. 6, 1922), that court, on page 622, held:

> "The duty of inspection arises out of the duty of the master to provide a safe place for the work of the employee, a duty which may not be delegated where they could have been discovered by reasonable inspection and by the exercise of reasonable care."

Again, in Pacific American Fisheries Co. v. Hoof, 291 Fed. 306, the Circuit Court of Appeals for the Ninth Circuit, at page 308, the court held:

> "The duty of the master to provide a safe working place and safe appliances is a positive and continuing one, and cannot be delegated. It was claimed on the trial that it was the duty of the appellee to inspect the ladder in question, but the court below found otherwise, and of that finding there is no complaint. If that duty did not devolve upon the appellee, it devolved upon someone else, and whoever discharged that duty represented the master. When the working place and appliances are unsafe, it is no answer to say that

> they were rendered unsafe at some previous time by the act of another servant. As already stated, the duty is a continuing one, and notice of defects and dangers will be imputed to the master."

It is a matter of judicial notice, that there is considerable traffic in San Pedro harbor. Vessels of all kinds constantly go in and out, and move from one place to another there. The inner harbor is narrow, and the water displaced by moving vessels and disturbed by the propellers, strike the near docks on both sides, and recoil, making a much larger swell and greater disturbance than obtain in large bodies of water under similar weather and traffic conditions. No vessel can move in San Pedro harbor without pitching and rolling, and, especially, in the month of April, which, even in San Pedro, is not a month of fine weather. Being thus a matter of judicial notice, especially for the District Court, the pitch and roll of a ship under way need not be alleged nor proved, and hence the unprotected pile of lumber on board the Brunswick, under the circumstances, was inherently dangerous. The added liability of hitting or being hit by another vessel or obstruction only enhanced the element of danger, and consequent liability of the respondent.

Issue III.

That the examination of master, officers, and crew, by proctor for libellant, as to certain matters of seamanship and the like, were wholly irrelevant to any inquiry pending before the commissioner.

Obviously the court ignored the fact that article III of the libel specifically alleged the incompetency of the seamen on board respondent's vessel Brunswick. The term seamen means everyone on board constituting the personnel complement of a ship, i. e., master, officers and crew. However, regardless of any such allegation in the libel, the maritime law requires the owner of every vessel to furnish competent master, officers and crew. The Circuit Court of Appeals for the Ninth Circuit, in The Ralph, 229 Fed. 52, at page 54, the court held:

> "In re Pacific Mail S. S. Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, this court held that it is the duty of the owner of a ship carrying goods and passengers, not only to provide a seaworthy ship, but also to provide the ship with a crew adequate in number and competent in their duties with reference to all the exigencies of the intended route, and that such a duty rests upon the owner by the general maritime law. In Lord v. G. N. & P. S. Co., 4 Sawy. 292, Fed. Cas. No. 8,506, it was held to be the duty of the owner to provide a vessel with a competent master and a competent crew, and to see that the ship when she sails is in all respects seaworthy, and that he is bound to exercise the utmost care in these particulars. In Adams v. Bortz (C. C. A.), 279 Fed. 521, it was said that the basic thought is that the vessel shall be equipped to perform the duty which she owes to the human beings on board her, and the cargo which she carries. Rainey v. N. Y. & P. S. Co., 216 Fed. 449, 132 C. C. A. 509,

is specially laid down by Arnold on Marine Insurance (10th Ed.), pp. 931, 932, and in Holland v. Seven Hundred and Seventy-five Tons of Coal (D. C.), 36 Fed. 785, 787, Judge Jenkins said that a vessel is not seaworthy if there be a failure to provide a proper crew."

Early in the examination of the master of the Brunswick, proctor for libellant sought to ascertain the "tactical diameter" of that ship, i. e., the time required from ascertained speed to stop, back, turn around, etc., and was surprised at his complete lack of knowledge. Further examination on the most elementary principles of seamanship, especially in reference to life boats and life-saving appliances, conclusively proved that the captain, first mate and crew did not have even the crudest knowledge of even the fundamental principles of these subjects or of seamanship in general. [Apostles, pp. 75 to 80, 84, 86 to 88, 95 to 97, 101 to 104 115 to 118.]

Issue IV.

The court found that it is a fact that there were no life lines, life rails, or other protection around the deck load of lumber, on top of which deceased was required to work (while the vessel was under way), and that such protection was not required because deceased was sent to the top of this lumber pile in broad daylight (and thus assumed the risk).

Much of what has been said in discussing Issues I and II is applicable here, especially as to the time he

was precipitated overboard, the condition of the top of the lumber pile, and the vessel under way at the time, and, naturally subject to pitch and roll.

In O'Brien v. Luckenback S. S. Co., 293 Fed. (C. C. A., 2nd Cir.) 170, at page 178, cited with approval the following:

> "In Imbrovek v. Hamburg American Steam Packet Co. (D. C.), 190 Fed. 229, the plaintiff was injured in the lower hold of a steamship while working for the stevedore. He was working under a hatch and was injured by the hatch falling into the hold, with everything resting upon it. In that case the court said:
>
> " 'It is easy to make a partially covered hatch absolutely safe. The cross-beams of the hatch have holes in the ends. There are corresponding holes in the hatch combings. Pins can be put through those holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen.' "

Obviously it is easy to stretch along the side of the ship a few life lines abreast of the lumber pile. It takes but a few minutes to put them up and remove them as the lumber has been removed, or to wait until the ship was moved to the dock at the east side of the channel where vessel was going before sending inexperienced longshoremen on top of a lumber pile. Either one of these two methods would conduce to safety.

In The Themistocles, 235 Fed. Rep. (C. C. A., 2nd Cir.), 81, June 6, 1916, it was held that:

> "A servant assumes all the ordinary and usual risks and perils of the employment, as well as all others of which he knows, or by the exercise of reasonable care might know; but he does not assume such risks as are created by the master's negligence, nor such as are latent, *nor such as are discovered only at the time of the injury.*"

In The Isthmian, 201 Fed. 572:

> "A ship was held liable for injury to a stevedore by falling through a hatchway, on the ground of its failure to furnish sufficient light to work by safely."

Again, in Chesapeake & Ohio Railroad Co. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 622 (60 L. Ed. 1102), the court in a unanimous opinion said:

> "To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and

is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."

Issue V.

That the deceased was precipitated into the water not because of any negligence of the respondent, or any of its employees, but because of his own negligence.

The Commissioner found as a fact "that the deceased was not guilty of contributory negligence in the performance of his said work on board the said ship Brunswick, and in no wise, while so employed, did he act otherwise than in a careful, cautions and prudent manner under the circumstances." [Apostles, p. 20, top.]

In view of the facts established under Issues I, II and IV, *supra*, and law applicable thereto, it is difficult to conceive by what process of reasoning the court arrived at its conclusion as heretofore cited, since the evidence conclusively negatived negligence on the part of the deceased, and equally conclusively proved gross and indefensible negligence on the part of respondent and its employees. Further, in addition to the violation of statutes enacted for the safety of em-

ployes, article 29, *supra* cited, respondent's employees violated other such statutes, hereinafter set forth.

Turning to the case of Western Fuel Company v. Garcia, a case of death by wrongful act in California waters, decided by the Circuit Court of Appeals for the Ninth Circuit, and reported in 255 Fed. 817, at pages 819, 820, the court held:

> "There being no United States statute upon the subject, the appellee's right to recover in the instant case must be found in a statute of California. Section 377 of its Code of Civil Procedure provides:
>
> " 'When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.'
>
> "The right upon which the judgment of the court below rests was clearly given by that statute. Subsequently section 1970 of the Civil Code of California was enacted, which provides, among other things, as follows:
>
> " 'An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same

employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee: Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured. * * *'"

"April 18, 1911, California passed another act (St. 1911, p. 796), providing, among other things, as follows:

" 'In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall

be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"'(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"'(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.'"

In this statute contributory negligence is not a bar where the negligence of the employee was slight and that of the employer was gross in comparison.

It will be noted that in admiralty law, contributory negligence is not a bar to recovery. The Supreme Court of the United States, in The Max Morris, where libellant was a longshoreman, as here, in 137 U. S. 1, 34 L. Ed. 586, at page 589 of 34 Law Edition, bottom of page, held:

> "The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

Further, the California statute, cited by the Circuit Court of Appeals for the Ninth Circuit, in 255 Fed. at page 820, *supra,* provides:

> "* * * The fact that such employee may have been guilty of contributory negligence shall

not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison. * * *"

Again, in O'Brien v. Luckenbach S. S. Co., 293 Fed. (C. C. A., 2nd Cir.) 170, at page 180, that court, in speaking of contributory negligence, held:

"(10) In such a case as this it must not only be remembered that the defendant must prove the plaintiff's contributory negligence, but that in order to prove it the evidence must be more than usually convincing. Thus in Harrison v. N. Y. C. & H. R. R. Co., 195 N. Y. 86, 87 N. E. 802, one of the questions was whether the deceased was free from contributory negligence. Chief Judge Cullen, writing for a unanimous court, said:

" 'The deceased having been killed, less evidence was required from his personal representative to establish his freedom from negligence than would have been required from him had he survived and been able to testify.' "

Issue VI.

That There Was No Testimony as to the Direction or Speed With Which Water in the Channel Was Moving, if at All, but That It Must Have Been Moving Because the Deceased Very Rapidly Either Swam, That Is, "Paddled," or Drifted Beyond the Stern of the Ship.

Point I.

There was some testimony as to the direction of the water at that time. Johannesen, who, himself alone,

pulled the heavy skiff 7 or 800 feet from inner to ourter part of channel in attempting to rescue deceased, testified:

"The tide was coming in, I guess, as far as I can remember. I ain't quite sure." [Apostles, p. 189.]

Point II.

It has been conclusively established by the testimony, that instead of the deceased swimming, paddling, or drifting beyond the stern of the ship, the vessel Brunswick continued on her course for some time after man fell overboard, i. e., kept going ahead. The master [Apostles, pp. 213, 214], Gallagher [Apostles, pp. 167, 168, 170, 171], Durante [Apostles, pp. 182, 183], Johannesen [Apostles, pp. 188 and 190], also stipulation that two other witnesses would testify same as Johannesen [Apostles, p. 192], William Hack [Apostles, p. 194, top].

Point III.

The propeller in moving the vessel ahead also moves the water astern.

Issues VII, VIII, IX and X.

"The court further found that the captain stopped the ship with all celerity he could command, in view of all the circumstances, and that an approaching (overtaking) vessel had to be taken into consideration."

"The court found that in speaking of the Brunswick after the deceased was precipitated overboard: 'It is obvious it could not be stopped immediately, and

an approaching (overtaking) vessel had to be taken into consideration.' "

"That the Inland Rules of the Road respecting one vessel overtaking another, etc., could only be considered where the vessels were proceeding normally, and that obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like."

"And that under such circumstances there was a duty devolving upon the master of the 'Brunswick' to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or property into danger."

POINT I.

While it may be conceded that the captain stopped the ship *with all the celerity at his command,* his own testimony conclusively proved that the celerity at his command was negligible or nil.

POINT II.

Here is a loaded vessel, 162 feet long, 34 feet beam. gross tonnage of 532, and 500 horsepower, Master. [Apostles, p. 75], just shoved off from dock, and going about two or 3 miles per hour [Apostles, pp. 103, 146 and 216], with full speed steam in boilers Chief Engineer, [Apostles, 204, bottom], which could have been stopped almost instantaneously by backing engine full power. Even when engine is stopped the vessel would

almost immediately stop. The fallacious reason given by the captain [Apostles, p. 213], "that he dare not stern, lest the suction of the propeller would drag him down and he would get killed that way", is born of ignorance, and conceived by incompetency. Every person standing on a dock or at the stern of a vessel knows that when the propeller backs full speed, or even slow speed, the water is forcibly pushed forward towards the forward part of the ship, and this powerful forward movement of the water carries with it every floating object in its immediate vicinity. Thus, the man is immediately pushed forward, and the momentum of the ship in a forward direction is immediately arrested.

Point III.

It is one of the most elementary principles of navigation, and law applicable thereto, that a leading or overtaken vessel owes absolutely no duty to another vessel coming up from astern, or overtaking vessel, except to inform the overtaking vessel by appropriate signal of her intended change of course. The giving of signal to overtaking vessel of abrupt change of course is governed by the General Prudentiary Rule, No. 27. The duty is also on the overtaking vessel not to come closer to the overtaken vessel than she can do with safety to the leading vessel and herself.

Article 24 of the Inland Rules, Act. June 7, 1897, c. 4, 30 Stat. 101 (Comp. Stat. Sec. 7898), provides that:

"Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

And the article also provides that:

"Every vessel coming up with another vessel from any direction more than two points aft her beam * * * shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear."

In The M. J. Rudolph, 292 Fed. (C. C. A., 2nd Cir.) 740, at page 742, that court held:

See The James L. Morgan, 225 Fed. 24, 26, 140 C. C. A. 360.

"(2, 3) If the overtaking vessel comes so close to an overtaken vessel that a sudden change of course by the latter may bring about a collision the fault is that of the overtaking vessel. She should not come so close without a signal. As this court held in The Merrill C. Hart, 188 Fed. 49, 51, 100 C. A. 187, 189:

" 'The overtaken vessel is not required to look behind before she changes her course, however abruptly.'

"And the rule which requires a signal from the overtaking vessel *and assent from the other* is intended, as we said in that case, to avoid just what, on the Rudolph's theory, happened on this occasion."

The Supreme Court of the United States, in speaking of sailing rules, in The Steamship City of Washington, 92 U. S. 31-41, 23 L. Ed. 600, held:

> "Usages, called sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in navigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed.
>
> "Plenary jurisdiction was conferred upon the courts in such controversies; and the judicial reports show, beyond peradventure, that the courts, both common law and admiralty, were constantly in the habit of referring to the established usages of the sea as furnishing the rule of decision to determine whether any fault of navigation was committed in the particular case; and, if so, which of the parties, if either, was responsible for the consequences.
>
> "Examples of the kind are quite too numerous for citation, and they are amply sufficient to prove that the usages of the sea, antecedent to the enactment of sailing rules, constituted the principal source from which the rules of decision, in such controversies, were drawn by the courts of admiralty and all the best writers upon the subject of admiralty law. Macl. Ship., 2nd ed., 280; Williams & B. Pr., pp. 4, 15.
>
> "Sailing rules and other regulations have since been enacted; and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the paramount rule of decision."

Issue XI.

That it should be kept in mind that there were upon the water at the time two or three small craft, and were nearer to the deceased than those upon the Brunswick were, and should be taken into consideration in determining the duty devolving upon the men of the Brunswick and the adequacy of their efforts.

Point I.

Even a cursory glance at the testimony heretofore set out shows that after the man fell overboard, the Brunswick kept going ahead, until she got into position abreast or opposite where these men in the boats referred to were working. All this time nothing was done by master, officers or crew of that ship, except to watch, and some of them shouted to the men in the boats. The record fails to disclose a single order given by the master. The first mate testified about his walking all around, and aft, and upon his arrival there, assumed a position of observation [Apostles, p. 136], and when he got aft, the life preserver was on deck [Apostles, p. 114], and reiterated [Apostles, p. 122], while Gallagher testified that he spent 4 to 6 minutes before he could untie the line holding the life buoy to the rail.

Chief Engineer Brown testified: "I heard them holler 'Man overboard,' rushed to the side, and started to get a life buoy but I seen it was too late so I didn't get one" [Apostles, p. 198]. Seaman Nagel testified: "Well, at that particular time, as soon as I saw the

man fall overboard, I shouted, 'Man overboard', I, myself, grabbed for the rope sling, and tried to throw it at him. When I looked over the side with the sling in my hand I saw two (the) men was astern already" [Apostles, p. 144]. Seaman Gibson testified: * * * "I heard these fellows running forward along the (deck) house, and I heard them and I looked out to see what was going on and I seen them all excited and looking outside * * *" [Apostles, p. 107]; while Gallagher testified: "They stood there; they didn't attempt to do anything", and again: "No, they didn't attempt. Just stood there looking around" [Apostles, 172].

Point II.

Even when the Brunswick arrived opposite or abreast the dredges, Johannesen, who was working on a dredge, upon hearing the cry of "Man overboard" frow the Brunswick, "throwed away his tools, jumped in the skiff, untied it, and himself alone pulled this heavy working boat to the deceased and got there just as he sank, the Brunswick being much closer to the deceased at the time he heard the cry of 'Man overboard' than what he (Johannesen) was" [Apostles, pp. 187, 188, 189].

Issue XII.

The court further held: If it could be said that deceased could have been saved if proper and efficient life saving appliances not on board the Brunswick had been there, and had been used with reasonable prompti-

tude and efficiency by the officers and crew thereof, then, of course, there would have been strong reason for supporting the conclusions arrived at by the commissioner, but that it should be borne in mind that it was stipulated that such equipment was there at time of inspections made both prior to and subsequent to the accident, and that there was no suggestion from any source of any change, and that the captain testifies that the usual and proper life boats and life buoys were on board and in their proper place.

In these findings the court seems to have laid great stress on the stipulation of proctor for libellant, who stipulated that she was fully equipped, at inspections made by the local inspectors, Steamboat Inspection Service, prior and subsequent to the accident. Being fully equipped, means having the required number of life boats, life buoys, etc., on board.

A reference to these stipulations will conclusively show their immateriality, in that they admit that the Brunswick was, upon an inspection made in December, 1921, about four months preceding the cause of action herein, found to be fully equipped (i. e., having the necessary number on board), by the local inspectors, Steamboat Inspection Service, and again, after the cause of action arose, as naturally would be inspected. The self-serving conclusion of the master, i. e., no change, testified to over objection of libellant's proctor, and accepted by the court, should have been ignored, not only because he testified to a self-serving conclusion over objection, but for other and more important

reasons hereinafter set forth. Indeed, there is no dispute as to the number of life-saving appliances required by law being actually on board the Brunswick at all times. The utility of these may, however, be rendered a nullity for life-saving purposes, and contrary to the letter and spirit of statutory law, hereinafter set forth, by the following conditions:

(a) Using the life boats as auxiliary storerooms;

(b) Securely stowing them on board with lashings, boat covers, stowing the boats' falls in the boats instead of having and keeping the boats in such a condition at all times that they can be immediately lowered;

(c) Placing all life preservers together for convenience or to suit the whims of the master or mate, and having them tied for a full due (permanently), instead of placing them in such a position that one would be available in the different parts of the ship, so that if a man fell overboard on the starboard or port side, forward or aft, the man nearest could grasp and throw a life buoy at once to him. It must be noted that a life buoy can be thrown but a very short distance, and to add to this the weight of 15 fathoms (90 feet) of line, renders the life buoys kept on the extreme stern of the ship absolutely useless, as the ship going ahead would have naturally gone further while a man was running to the stern of the ship, than he could throw the life preserver with 15 fathoms of line as thick as a fountain pen attached.

(d) While a ship may have two boats on board, they are not and cannot be regarded as life boats unless

and until they are so rigged and equipped that they can be immediately launched at all times and under any and all weather conditions. Similarly, too, life buoys are only useful when they are so placed to be immediately available to be thrown to a man who falls overboard.

Even at the risk of repetition, let us ascertain from the testimony the actual condition, accessibility and availabiliy of these life-saving appliances for use intended, and as required by law:

There were but two boats on board the Brunswick [Apostles, p. 89].

The chief engineer testified that the port life boat was the best to get over (launched), and that the deceased fell overboard on the starboard side, and that no effort was made to get the starboard life boat adrift. [Apostles, p. 206, top.]

The first mate testified that there was a hawser coiled in the port life boat, that it was the working life boat, that she was secured in the skids, having lashings on, boat cover on, which was tied by stops (small ropes, which, when wet, or damp, as is usual in a vessel coming from the north in month of April, are very difficult to untie) tied under the keel [Apostles, p. 220]; that he had to clear the halyards (meaning the boat falls or purchase tackle); the halyards are generally inside the boat [Apostles, p. 219].

Courts will judicially notice all matters of science involved in the case being tried. Brown v. Piper, 91

U. S. 37. Hence courts of admiralty will judicially notice that the smallest hawser is 5″ in circumference and 120 fathoms in length. This is too heavy and cumbersome to be thrown out of boat by even four men, and the quickest way to get it out of a boat is by coiling it on deck, and if wet or damp would be full of kinks, etc., and would take two well trained men at least 20 minutes to so coil it.

The Brunswick had four life buoys, and these were hanging at the taffrail or stern rail [Apostles, p. 114], and, as testified by Gallagher [Apostles, p. 168], and positively reiterated in his testimony [Apostles, p. 175], was secured to the stern rail with a piece of line about the size of a fountain pen and tied with a square knot, which when wet is very difficult to untie, and so found by this witness, who (like all other water front men), is familiar with knots.

Now, with reference to life saving appliances, the United States statutory law on the specific requirements of life boats and life buoys will be found in Barnes' Federal Code, page 1779, subheading:

"Handling of the Boats and Rafts.

"All the boats and rafts must be stowed in such a way that they can be launched in the shortest possible time, and that, even under unfavorable conditions of list and trim from the point of view of the handling of the boats and rafts, it may be possible to embark in them as large a number of persons as possible."

Again, in Barnes' Federal Code, page 1784, under subheading:

"Life Jackets and Life Buoys.

"* * * Fifth. All the life buoys and life jackets shall be so placed as to be readily accessible to the persons on board, their position shall be plainly indicated so as to be known to the persons concerned.

"The life buoys shall always be capable of being rapidly cast loose, and shall not be permanently secured in any way."

Again, in Norfolk Southern R. Co. v. Foreman, 244 Fed. Rep. (C. C. A., 4th Cir., July 16, 1917) 360, which was a case analogous to the instant case, it was held that:

"The evidence does not seem to show that the blow struck by the tug on the barge when approaching for the purpose of making fast in the stream was of extraordinary or unusual violence. Neither the tug nor the barge appeared to have been injured. The coming together of two such boats in midstream, both more or less in motion, is always accompanied by some jar or thump, and there is nothing in the testimony to show that the contact in this case was more violent than is usual in similar cases. There does seem to have been delay in the efforts to rescue Skinner, due to the absence of the best facilities. The deck hand who endeavored to throw the line, had a line apparently too heavy for him to fling far enough to reach Skinner where the latter was in the water, although a lighter line might have accomplished the

purpose. *There was no ring buoy or life preserver at hand at that juncture for the deck hand to fling to Skinner.* The deck hand had to go up the side of the house of the tug to the deck above near the pilot house, and break open a box to get out a life preserver, and when he flung the life preserver the tug had drifted so far from Skinner the life preserver failed to reach him. From all the evidence it would appear that the drowning was the result of a chain of circumstances. Skinner was too inexperienced or too careless to handle himself on the runway of the barge, and the unexpected (to him) force of the jar and sheer caused by the tug striking the barge, precipitated him overboard. He seems to have been unable to swim, and the lack of having at hand the proper facilities on the tug to rescue him, caused a delay which made the efforts at rescue futile.

"Assuming that Skinner's ignorance and inexperience, with the act of the captain in putting him in a dangerous position, were not in issue, as not having been alleged in the libel, then the decree of the court below, construed as being responsive to the libel, found as a conclusion of fact that the respondent was guilty of negligence in one or both of the particulars charged in the libel. It seems to this court that if an employer requires its employees to work in a place where they may be subjected to the danger and peril of being precipitated into the water, as in the present case, there should be provided devices and facilities reasonably fit and accessible to ward off a fatal *eventuation by effecting a rescue if reasonably possible.*"

In re Reichert Towing Line, 257 Fed. 214, C. C. A. 370, held:

> "However, even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible cause, and that he is not in fault in connection with any one of them."

Certiorari denied. 248 U. S. 565.

Issue XIII.

That the partner of the deceased, a longshoreman, after deceased fell into the bay, started to throw a life preserver to him, obviously though working upon it, due perhaps to his excited state he did not know how to remove it from its appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to put it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up, and without difficulty took it from its place.

Here the court, contrary to commissioner's finding of fact, rejected the positive and reiterated testimony of Gallagher, and accepted the testimony of that embryo seaman, Gibson.

Issue XIV.

Very likely the partner of the deceased working on the life buoy deterred some of the sailors from going to it and throwing it overboard. Without doubt it was thought that the partner of the deceased would do that what he was trying to do, to wit, throw a life preserver to the deceased.

There is no evidence at all in the record about this finding, nor is there any usage, or custom of the sea, or any known principle of admiralty law which authorize or even condone the delegation by supposedly trained men of their life saving duty to others, especially to those of unknown qualifications in that respect. The adoption of such a rule would be to introduce into admiralty law and seamen's practice, a novel and dangerous doctrine, and one opposed to the humane spirit of admiralty law, and to the steady modern trend of judicial decision.

Issue XV.

That the deceased having fallen overboard, due to his own negligence, no recovery could be had unless it should be proven to the degree required by law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I canont believe the proof adduced suffices to establish this conclusion, and disaffirm any conclusions and recommendations reached by the commissioner, and that if the rule, contended for by the respondent, as illustrated in Burton v. Grieg, 271 Fed.

271, be accepted, then there is less ground for a decree in favor of libellant upon the facts actually adduced.

In The Anglo Patagonian, 228 Fed. 1016, held:

> "The case turns entirely upon whose fault it was, if that of any one, that the anchor gave way, causing the injuries complained of. The anchor was undoubtedly part of the ship's appliances, and under her control, and for damages arising from the falling of the same, by reason of insecure fastening or imperfections in connection with its construction, the ship clearly, as between herself and these libellants, is liable. The ship insists that it was not necessary for her to do more than properly make the anchor fast in the hawse pipe, by the brake bank of the windlass; *that was the universal custom when in port and in dry dock in this country,* though in Europe it was customary to lower the anchor to the bottom of the dock, when in dry dock.
>
> *"It seems to the court that the test of the sufficiency of what the ship did in this case should be determined in the light of the result that followed.* Upon the whole case, in the judgment of the court, it is clear that as between the ship and these libellants, she is responsible for the injuries of the latter."

In this connection attention is respectfully invited to R. S. Sec. 4602, Sec. 7615, Barnes' Federal Code, which reads as follows:

> "Any master of, or any seaman or apprentice belonging to, any merchant vessel, who, by willful breach of duty, or by reason of drunkenness, does

any act tending to the immediate loss or destruction of, or serious damage to such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or who by willful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such vessel from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall, for every such offense, be deemed guilty of a misdemeanor, punishable by imprisonment for not more than twelve months. (R. S. 4602, Act June 7, 1872, c. 322-54, 17 Stat. 274.)"

Obviously the court ignored the doctrine of *res ipsa loquitur,* so carefully considered and explained by the Circuit Court of Appeals for the Ninth Circuit, in The Joseph B. Thomas, 86 Fed. 662.

Further, as the right of action in this case was given by the statutes of the state of California, Western Fuel Company v. Garcia, *supra,* the following cases are illuminating:

In Lippert v. Pacific Sugar Corporation, 33 Cal. App. 199, which was "an action for damages":

"This is an action for damages brought by the surviving wife and minor child of William Leo Lippert, who, on the fifteenth day of July, 1909, was killed by the bursting of a 'pre-heater,' used by defendant for the purpose of heating sugar beet juices. At the time of the accident, Lippert

was twenty-eight and one-half years of age, and the minor child was eighteen months old. The jury found for plaintiffs in the sum of twenty thousand dollars and judgment was entered in their favor for that amount. The appeal is by defendant from the judgment and from an order denying its motion for a new trial.

"Appellant makes the following points:

"1. That deceased was employed as master mechanic and was entrusted with the oversight of all the machinery of the sugar-house;

"2. He, therefore, assumed the risks of his employment;

"3. Contributory negligence on the part of the deceased;

"4. He fully knew and appreciated and apprehended all of the dangers surrounding his employment;

"5. That if the pre-heater was out of repair it was patent to the deceased and it was his duty to have remedied its condition;

"6. If that was the condition of the apparatus, he should have complained of it to defendant;

"7. When deceased was employed as mechanic and assistant superintendent, he expressly assumed the duty of putting all machinery into thorough running condition.

"Upon the close of plaintiffs' case, defendant moved for a non-suit on the grounds:

"1. That no negligence on the part of defendant had been shown;

"2. Deceased was guilty of contributory negligence;

"3. Deceased assumed the risk of the employment.

"The court denied the motion of non-suit.

"In Shoarmen and Redfield on Negligence, section 60, the following rule is declared: 'Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' In Rose v. Stephens etc. Co., 11 Fed. 438, it is said: 'In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition or was not properly managed, was justifiable.' It was further said that, while the rule is more frequently applied in cases against carriers of passengers than in any other class, there is no foundation for limiting the rule to carriers. 'The presumption,' said the court, 'originates from the nature of the act and not from the nature of the relations between the parties.'

"The cases are industriously cited and considered in Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020. Referring to the case of Young v. Bransford, 12 Lea (Tenn.) 232, which supports a contrary doctrine, attention is called to the following language in the reported opinion of that case: 'At

the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.' We are satisfied that this is a case where the doctrine of *res ipsa loquitur* is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 63 L. R. A. 285, 68 N. E. 10, where it was said: 'The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine (*res ipsa loquitur*), because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. The position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in Winship v. New York, N. H. & H. R. Co., 170 Mass 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not appear,

or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause, does not stop the plantiff from relying upon the presumptions applicable to it.

The judgment and order are affirmed.

Burnett, J. and Hart, Jr., concurred.

A petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on May 10, 1917."

Also,

Soto v. Spring Valley Water Co., 39 Cal. App. 188.

Finally the court erred in overruling the findings of the Commissioner. It will be observed that by stipulation of the parties, and in pursuance thereof, the court made an order of reference directing him to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree, and that all witnesses personally appeared before the Commissioner.

"The finding of a commissioner will not be disturbed as to matters of fact upon which the evidence is doubtful, or the inferences are uncertain, much less involve to a greater or less degree the credibility of witnesses."

"Panama R. Co. v. Napier Shipping Co., 166 U. W. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004; The Oceanica, 156 Fed. 306; The Minniehaha, 151 Fed. 782; The North Star, 151 Fed. 168, 80 C. C. A., 536; The Mobila, 147 Fed. 882; The La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed 210 U. S. 95, 28 Sup. Ct. 664."

In Petition of Diamond Coal & Coke Co., 297 Fed. 242, at page 245, Judge Thompson said: (Affirmed 297 Fed. (C. C. A. 4th Cir.) 246)

"But the Commissioner saw the witnesses and heard them testify, and this is a matater of substantial importance. When the evidence is transcribed to the written page, much of value bearing on its probative force is wholly lost. It can then only be measured by the words which the witness used. The character and make-up of the witness as disclosed by his appearance; his manner of testifying; his apparent candor or lack of it; his hesitancy, arising from uncertainty as to the fact, or his positiveness, based on the certainty of conviction—these and other like considerations may be largely controlling in determining the credibility of a witness and the weight to which his testimony is entitled. The opinion of the Commissioner, therefore, is entitled to great weight on the questions of fact as to defendant's negligence, and the amount of damage resulting therefrom. Negligence on the part of the petitioner has been found by the Commissioner, and he has, after the taking of considerable testimony, fixed the amount of damage resulting to each of the respondents."

Again, in Luckenback v. Delaware, L. & W. R. Co., 168 Fed. 560, where Judge Adams said:

> "This order was entered upon the consent of the parties. Subsequently the Commissioner reported that the libellants were entitled to recover a certain amount, and the respondent thereupon excepted. The present motion to dismiss was then made. The libellants urge that the exceptions can not be considered because the whole matter was referred, and the respondent's only remedy is by an appeal. It seems that this point is well taken. When the court and the parties agreed that the matter should be heard and determined by the Commissioner, apparently the court had no supervising powers over his action. It then became similar to the familiar practice in the state courts and the United States Circuit Court of using referees to assist in the work of the court, the referees in such cases being invested with the full power of the court in the respects mentioned, necessarily excluding any revision by the court. The respondent argues in opposition that the order in question, after directing the Commissioner to hear and determine all the issues, also directed him to report to this court, and it is still within the power and is the duty of the court to make its own decree with reference thereto. The decree here, of course, must be made by the court. That power, under the practice prevailing here, could not be delegated and it is still necessary that the decree should be the court's, but that does not prevent the court, with the consent of the parties, from appointing a person to pass upon the law and

merits of the controversies involved, without review by the court.

The exceptions are dismissed."

In reference to "Inevitable Accident" set up by respondent *in re* Reichert Towing Line, 251 Fed. (C. C. A. 2nd Cir.) 217, held:

> "However, even in tort cases, where there is no contractical liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them." Certiorari denied 248 U. S. 565.

Referring now to the effect of the plea of contributory negligence of respondent herein, in Murray v. Southern Pacific Co., 236 Fed. (C. C. A. 9th Cir.) 704, the court held:

> "Contributory negligence is the want of ordinary care upon the part of the person injured by the ACTIONABLE NEGLIGENCE of another combining and concurring with that negligence to produce the injury, and therefore THE DEFENSE OF CONTRIBUTORY NEGLIGENCE CONCEDES THAT THERE WAS ACTIONABLE NEGLIGENCE ON THE PART OF THE DEFENDANT."

Exemplary Damages.

In Standard Engineering Co. v. Oriental Bulkhead Improvement Co., 226, Fed. 196, the 4th Circuit Court of Appeals held:

> "This evidence tended to show, not only negligence, but wantoness, and warranted a finding of both compensatory and punitive damages."

Again, in Whitmer v. El Paso and S. W. Co., 201 Fed. (C. C. A. 5th Cir.) 198, held:

> (4) The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer."

Again, at page 200 of the same decision, that court, citing a number of decisions, including 91 U. S. 489, held:

> "Negligence, which shows a reckless indifference to consequence and to the rights and safety of others, is the equivalent of willful wrong, so far as concerns the allowance of exemplary damages. The court then went on to say: 'When a person from his knowledge of existing circumstances and conditions is conscious that his conduct will probably result in injury to others, and yet, with reckless indifference or disregard of the probable consequences, although he may have no intent to injure, does the act, or fails to the act, and the injury results, there is liability for exemplary damages."

The Supreme Court of the United States, in the case cited by the Circuit Court of Appeals, 226 Fed. 200, at page 376 of 23 L. Ed. held:

> "Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done willfully, or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Conclusion.

The final decree of the District Court should be disaffirmed. The findings of fact and conclusions of law of the Commissioner should be affirmed, with the single exception that interest should be allowed at 7%, the legal rate of interest prevailing in California.

The appellee's defense is purely specious, and without merit, in that in the instant case, when the cry of "Man overboard" was raised, the Brunswick had just left one dock and was proceeding to another, and this necessitated the presence of all deck officers and

crew on deck, and thus available for any emergency. The ship was going very slowly, or about 2 or 3 miles per hour, with full head of steam in boilers, and in the Inner Harbor of San Pedro, with a gang of water front workers (longshoremen) on board, ready, able and willing to respond to any call. There was absolutely no concerted action taken. No orders given by the captain, who appeared to have stood hopelessly helpless and dumb-founded and incapable of doing anything except to watch; the first mate, instead of immediately assuming a position of direction, supervision and seamanlike control of operations reasonably conducive to the rescue of the man overboard, according to his own testimony, walked all around and walked aft, getting to his position aft where lifeboat was, and found life buoy on deck, although Gallagher also went from top of forward lumber pile to stern, and spent 4 to 6 minutes trying to get the life buoy adrift there. When the first mate arrived aft he immediately assumed and retained a position of observation.

The captain, first mate, chief engineer, seamen Gibson and Nagel, saw everything that happened, and many things that did not happen, as heretofore pointed out, thus negativing any other activities on their part. They did nothing but watch, and the record fails absolutely to disclose a single efficient, or any, effort towards rescuing the man overboard.

Appellee's vessel, "Brunswick," according to testimony of its own witnesses, was absolutely unsea-

worthy in respect (a) the stowage, inaccessibility and unavailability of lifeboats and life buoys;

(b) Incompetent master, officer and crew;

(c) Inadequate number of crew on deck.

There was an entire absence of any proof of "Man overboard," fire, or abandon ship drills, as required by law, and immemorial usages of the sea, each of which involves the rapid launching of all life boats, and the effective use of life buoys, life preservers, and life rafts. At these drills every officer and man, including engineer's force, stewards, cooks, etc., has assigned to him a particular station and specific duty at that station.

The fact that the lifeboats were used as auxiliary store rooms, and securely lashed with boat covers on, etc., the placing of all life buoys together at stern of ship and securing them there, all manifest the incompetency of the master, officers and crew, which has been otherwise conclusively established, and demonstrate their wanton disregard of the humane usages of the sea, the statutory law applicable to the stowage, accessibility and availability of lifeboats and life saving appliance, and their reckless indifference to the rights and safety of those on board.

To permit appellee to escape liability would be destructive of the most cardinal principle of admiralty law, i. e., inherent natural justice, and would be conducive to the promotion of culpable inefficiency and criminal negligence on board ships, where the safety

of ship, cargo, and human beings on board, demand the highest order of efficiency, training and discipline, in order to meet the ever varying perils of the sea, and unforeseen contingencies incident thereto.

Wherefore, it is respectfully submitted and prayed that the findings of fact, conclusions of law, and recommended judgment and decree of the Commissioner, be by this Honorable Court affirmed, with interest of 7% from date of death, April 18, 1922.

Dated, San Pedro, California, September 19, 1924.

JOHN J. MONAHAN,
Proctor for Appellant.